

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1265

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

GARY COLE, ZACHARY MARTIN and
DENNIS MARTIN,
Defendants-Appellants.

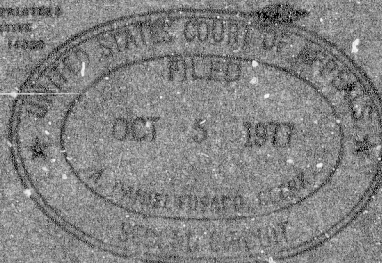
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE

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IN THE
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For the Second Circuit

Docket No. 77-1265

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GARY COLE, ZACHARY MARTIN
and DENNIS MARTIN,
Defendants-Appellants.

On Appeal From the United States District Court
For The Western District of New York

BRIEF FOR THE APPELLEE

Preliminary Statement

Defendants Zachary Martin, Dennis Martin, Gary Cole and Alphonso Handley were arrested on November 26, 1976 on a criminal complaint and charged with a violation of Title 18, United States Code, Section 2113(a) and Title 18, United States Code, Section 371. These charges arose out of an attempted bank robbery at the Manufacturers and Traders Trust Company in Buffalo, New York on November 26, 1976. A preliminary hearing was held on this charge on December 3, 1976 and probable cause was found by the United States

Magistrate who bound all four defendants over for proceedings before the Grand Jury. An indictment was subsequently returned on January 20, 1977 charging defendant Gary Cole with attempting to rob the above-mentioned bank and Alphonso Handley, Dennis Martin and Zachary Martin with aiding and abetting the attempted robbery, and Count II involving a conspiracy among the four defendants to rob said bank.¹

Following various motions to suppress, a suppression hearing was held before the District Court on February 14, 1977 and March 21, 1977, and at the conclusion of the hearing, the Court reserved decision on the various motions to suppress. On May 9, 1977, the day before jury selection was to begin, the Court made its rulings on the various suppression motions, along with findings of fact, wherein Judge Elfvin denied the motions to suppress as to defendants Dennis Martin, Zachary Martin and Gary Cole in all respects. All of the defendants appeared in front of Judge Elfvin on May 17, 1977 and entered pleas to various counts of the indictment, while reserving their right to appeal his denial of their suppression motions. Gary Cole was sentenced to eight years in the custody of the Attorney General, the imposition of that sentence was suspended, and he was placed on probation for five years. Zachary Martin was sentenced to four years in the custody of the Attorney General, and is currently free on bail pending this appeal. Dennis Martin was sentenced to three years in the custody of the Attorney General, the imposition of that sentence was suspended and he was placed on

¹ On June 6, 1977 defendant Alphonso Handley entered a plea of guilty to Count II of the indictment involving a violation of Title 18, U. S. Code, Section 371 and was sentenced to five years incarceration, the imposition of which was suspended and he was placed on four years' probation. He has chosen not to appeal.

probation for three years. All three of these defendants appeal to this Court from the judge's denial of their various motions to suppress.

Statement of Facts

On November 26, 1976 an attempt was made to rob the Manufacturers and Traders Trust Company, Hertel-Parkside Branch, in Buffalo, New York, by one young Negro male (App. 127). After the victim teller feigned fainting, this individual fled from the bank and was accompanied by another individual who had been standing outside the bank (App. 127). They proceeded some distance away and left the scene in a car which was occupied by four individuals (App. 94). After various witnesses gave a license number to the getaway car, the Buffalo Police Department proceeded to the apartment of the registered owner of the vehicle, Zachary Martin. The officers brought Zachary Martin and Gary Cole, along with another occupant of the apartment, back to the bank for viewing by various witnesses to the event. Dennis Martin was found in a nearby residence and was also returned to the bank for viewing. The suspects were brought back to the scene of the bank robbery for identification purposes within approximately 20 to 40 minutes after the bank robbery (App. 136).

At the showup at the bank, defendant Gary Cole was identified by the victim teller, Elizabeth Malary, as the individual who handed her the demand note. Cole was also identified by another teller, Sara Johnson, and a customer of the bank, Douglas Murdoch.² Inasmuch as only one individual had en-

² Alphonso Handley was identified by Sara Johnson as an individual she had seen acting suspicious while standing outside of the bank prior to the robbery.

tered the bank and he had been identified as Gary Cole, there was no identification offered at the scene with respect to either Dennis Martin or Zachary Martin.

After the showup procedures were completed at the bank, the defendants were transferred to the Buffalo Police Department Headquarters where Dennis Martin and Zachary Martin subsequently gave confessions. Special Agents James McGuigan and James Gotter of the FBI advised Zachary Martin that the purpose of the interview was to discuss the bank robbery and then they read to him, and he himself read, the "Interrogation: Advice of Rights" form, setting forth his *Miranda* rights, which he stated he understood and he signed the waiver of rights form at the bottom thereof (App. 170). Zachary Martin then proceeded to give an oral statement as to the facts behind the attempted robbery (App. 172).

Special Agent James Gotter of the FBI and Special Agent McGuigan proceeded to talk to Dennis Martin concerning the events which transpired at the bank robbery and presented Dennis Martin with an "Interrogation: Advice of Rights" form, setting forth his *Miranda* rights, which Dennis Martin read and stated he understood and which Agent Gotter read to him (App. 193, 194).

Agent Gotter testified at the suppression hearing that at no time during the taking of the statement did Dennis Martin indicate that he might be under the influence of narcotics to the extent that he did not want to continue giving the statement or would be unaware of what he was doing (App. 196, 197). Defendant Dennis Martin took the stand at the suppression hearing and testified that he was under the influence of drugs when he made the statement at Police Headquarters on November 26, 1976 (App. 224). Further, he stated that although he had a recollection of making certain statements, he did not have any recollection of waiving his *Miranda* rights

(App. 226). Agent Gotter testified at the suppression hearing that he recalled Agent McGuigan also reminding Dennis Martin of his *Miranda* rights and requesting whether he understood these rights prior to giving any statements (App. 199). Zachary Martin also took the stand at the suppression hearing and denied being able to remember the events on November 26, 1976 due to being under the influence of drugs (App. 212, 213). He further indicated that he had been using drugs for the past three and a half years on a regular basis and described the effects that they would have on him (App. 213). Zachary Martin did admit on cross-examination to the fact that he had been in Assistant U. S. Attorney James A. Fronk's office for some general questioning approximately two years before and that he recalled speaking on that day without evidence of any sickness due to drug use (App. 215).

Agent McGuigan further testified that Mr. Zachary Martin never indicated to him that he was sick, that he never had any speech problems, that he never indicated he did not want to go on, had never exhibited any behavior which would indicate to the agent that he was undergoing drug problems (App. 179-181).

Issues Presented

1. Whether the alleged narcotics use by a defendant would render any confession given after the proper *Miranda* warnings inadmissible as being involuntarily made?
2. Does the destruction by the FBI of its rough notes render subsequent statements inadmissible?
3. Whether the identifications resulting from showups at the bank immediately after the bank robbery were impermissibly suggestive enough to taint any subsequent in-court identification at the trial.

ARGUMENT

POINT I

Confessions given by Zachary Martin and Dennis Martin were voluntarily given to the FBI agents after they had been advised of and waived their Miranda rights.

Defendants Zachary Martin and Dennis Martin contend that their confessions were made while under the influence of narcotics and therefore involuntary. They further contend that the FBI agents who conducted the interrogation should have been aware of the defendant's drug-induced condition, and that upon such discovery, should have ceased the interview. These contentions are without merit.

A confession not the product of a free intellect renders that confession inadmissible. *Townsend v. Sain*, 372 U.S. 293 (1963); *United States v. Harden*, 480 F.2d 469 (8th Cir. 1973). That determination looks to the totality of the circumstances. *Boulden v. Holman*, 394 U.S. 478 (1969); *United States v. Moore*, 290 F.2d 436 (2nd Cir. 1961). A confession made under the influence of drugs is suspect, requiring a full and complete evidentiary hearing to resolve the issue of its voluntariness. It is not *per se* involuntary. *United States v. Harden, supra*, at 651. A drug induced state is a valid factor in determining whether a confession was made voluntarily. There are other equally important factors. It is determinative whether defendant was under control of his senses and that he fully understood the consequences of his statements. *United States v. Grant*, 427 F.Supp. 45 (S.D.N.Y. 1976).

The cases cited by defendants to support their claim that their confessions were involuntary, and consequently

violative of due process if admitted as evidence, are not factually on point. The interviewing agents, McGuigan and Gatter, both testified, and appellants do not dispute, that the defendants appeared calm, relaxed and coherent (App. 179, 200). In *Townsend v. Sain, supra* (Appellants' Brief, p. 14), the undisputed facts reported that petitioner had complained to the interrogating officer that he was experiencing withdrawal symptoms and indeed "clutched convulsively at his stomach a number of times" *Townsend v. Sain, supra*, at 298.

The confession in *Jackson v. Denno*, 378 U.S. 386 (1964) (Appellants' Brief, p. 15) was made after defendant had been shot twice. Other admissions were made after considerable loss of blood by the defendant, and the administration of drugs to him. In *United States v. Harden, supra* (Appellants' Brief, p. 15), defendant was experiencing withdrawal symptoms and informed the interviewers he was an addict and "needed a fix". *United States v. Harden, Id.* at 651. Defendant was taken to the hospital, was administered Demerol for discomfort, and subsequently reaffirmed the details of his prior confession. Despite those circumstances, the Court affirmed the district court's finding of voluntariness. In contrast here, there were no such obvious signs of drug intoxication or sickness.

Defendants argue three main factors in the "totality of circumstances": which deem the confessions involuntary. First, the fact that defendant Zachary Martin told Agent McGuigan that he was a drug user, and McGuigan's observance of needle marks in Zachary's arm (Appellant's Brief, p. 16). Second, Dennis Martin's calmness and lack of perspiration should have "alerted" the agents to something, since such conduct would not be the obvious course of conduct during an interrogation (Appellant's Brief, pp. 17-18). Third, the

defendants were intimidated by virtue of being in police custody (Appellant's Brief, pp. 21-22).

As to the first circumstance, it is true that Zachary Martin told Agent McGuigan that he was a drug user. (App. 180). Although McGuigan was aware from the interview that Zachary Martin used drugs, he was unable to determine from defendant's physical appearance or behavior that defendant was affected at the time of the interview. McGuigan testified at the suppression hearing that Zachary neither appeared to be sick, nor did he tell the agent that he was sick (App. 179). McGuigan further testified that the defendant did not appear to be undergoing any withdrawal symptoms, nor did defendant indicate to McGuigan that he was (App. 179). Defendant did not indicate that he was unable to talk, or that he would be physically sick (App. 180). Defendant did not exhibit any symptoms which indicated to McGuigan that defendant was sick, had taken drugs, or was unable to continue (App. 180-181). Agent McGuigan further testified that defendant appeared to speak in a voluntary manner, and that defendant's speech pattern was not blurred in any way (App. 181).

The second circumstance which defendants propound as evidencing the involuntary nature of their confessions was Dennis Martin's demeanor during interrogation. Martin was calm and coherent during the interview (App. 203). Defendant's position is that Martin should have been nervous and perspiring (Appellant's Brief, pp. 17-18). Whether that be true or not, Agent Gotter was unable to determine from Dennis Martin's physical appearance or conduct that he was ill, undergoing withdrawal, unable or unwilling to talk, or that he was unable to understand what was going on (App. 195-197). In fact, defendant appeared very calm and coherent (App. 203). Defendant testified as well that he felt very calm

and relaxed (App. 225). Moreover, defendant recalls Agent's Gotter's reading to him the Advice of Rights sheet, and defendant remembers talking to Gotter during the interview (App. 226).

With respect to the third circumstance—intimidation of defendants by virtue of their presence in Police Headquarters—there is no evidence in the record to support such a claim. Defendants state that it is a significant factor to be considered in determining voluntariness, yet the issue was never explored at the Suppression Hearing.

Judge Elfvin made findings regarding the voluntariness of the confessions at the conclusion of testimony at the Suppression Hearing. As to the defendant Dennis Martin, Judge Elfvin found that "he gave every appearance of appearing to be mentally competent and understanding of what was going on, . . ." (App. 245). Further, despite defendant's admittance that he was on drugs, he also admitted that the rights were read to him, and therefore, "nothing in that could cause me to suppress the oral statement made by Dennis Martin" (App. 245).

With respect to Zachary Martin's confession, Judge Elfvin recognized the factual discrepancy surrounding it. On the one hand, Agent McGuigan testified that there were no signs of withdrawal or sickness, nor any statement by Zachary Martin that he was undergoing either experience. On the other hand, there was testimony by Martin and two others that he had taken drugs the morning of the alleged crime, and consequently did not know what he was doing (App. 246). Judge Elfvin concluded that there was "certainly sufficient evidence for the jury" to find that the confession had been given voluntarily; it would be up to the jury to determine (App. 247).

It is the Government's position that Judge Elfvin made the proper findings on this issue. Since the question of voluntariness was fully developed at the Suppression Hearing, and Judge Elfvin was able to observe the demeanor of the various witnesses, his decision regarding the voluntary nature of the confession should be final unless clearly erroneous. *United States v. Boston*, 508 F.2d 1171 (2nd Cir. 1974). *United States v. Gottfried*, 165 F.2d 360 (2nd Cir. 1948); *Ortiz v. United States*, 318 F.2d 450 (9th Cir. 1963).

Ortiz v. United States, Id., cited by the Southern District in *United States v. Grant*, 427 F.Supp. 45 (S.D.N.Y. 1976), is particularly significant because of its factual similarity. There the defendant contended that he was experiencing withdrawal symptoms at the time of his questioning. Specifically, defendant claimed that he had a bloody nose, cramps, and sank to the floor during interrogation. The law enforcement officers denied those circumstances existed. The Court, leaving the final determination to the jury, stated:

"A reading of the record gives no indication that the influence of the narcotic drug affected appellant's ability to comprehend questions, or that he was incoherent. He apparently answered all questions coherently and in an intelligible manner." *Ortiz v. United States, Id.* at 453.

In light of the relevant testimony from the Suppression Hearing, Judge Elfvin's findings of fact, and applicable case law, the confessions by the defendants in this case were voluntary and freely given.

POINT II

Destruction by the FBI of their rough notes does not render the subsequent statement inadmissible.

It is clearly established in this Circuit that there is no duty on the part of law enforcement officers to retain their rough notes when their contents are incorporated into official records and they destroy the notes in good faith. *United States v. Anzalone*, 555 F.2d 317, 321 (2nd Cir. 1977); *United States v. Terrell*, 474 F.2d 872, 877 (2nd Cir. 1973).

Appellants Martin do not dispute the fact that it is FBI policy to destroy rough notes after preparation of the 302 form (App. 171-172). The FBI agents here testified as to the specific procedure they had followed, which was in keeping with this policy. (App. 177, 197). They indicated that they examine their notes, dictate a written statement, compare the typed statement to the rough notes, make any corrections, then when the typed statement is accurate, they destroy their rough notes (App. 177, 178, 197).

Further, there is no evidence that destruction of the FBI agents' rough notes was done for the purpose of preventing their use by the defense. There has been no showing that the rough notes would furnish information which would supplement the agents' testimony or the 302 forms. Judge Elfvin held that *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) was not binding on him inasmuch as the *Anzalone* and *Terrell* cases, *supra*, for the Second Circuit were on point. Therefore, the routine destruction of the FBI rough notes, after preparing a statement, without a showing of conflicts in the statements or lack of good faith in the destruction, will not render the statement inadmissible.

POINT III

The showup at the bank was not so impermissibly suggestive so as to render subsequent identifications at trial inadmissible.

The identifications in this case were based on "showups" which took place at the bank approximately 30 to 40 minutes after the attempted bank robbery. The practice of exhibiting suspects to witnesses on a one-on-one situation has traditionally been criticized because many of the incidents of reliability of an identification may be lacking. *Stovall v. Denno*, 388 U.S. 293 (1967). Any *per se* condemnation of this type of identification procedure, would not account for the variables which apply to any identification which would be part of the "totality of circumstances" standard which has been traditionally applied to pre-*Stovall* confrontations. *Neil v. Biggers*, 409 U.S. 188 (1972).

The Supreme Court has recently had occasion to consider this doctrine once again and has concluded that "reliability is the lynch pin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations". *Manson v. Brathwaite*, 485 Law Week 4681 (June 16, 1977). The court stated that the totality of circumstances as set forth in *Stovall* and interpreted by *Biggers* would adequately safeguard any reliability standards concerning this type of identification.

The standards which were set forth in the *Biggers* opinion were the opportunity of the witness to view the criminals at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Biggers*, 409 U.S. at 199, 200.

In the instant case, the Government would maintain that the showups conducted at the bank were consistently within the standards set forth in *Biggers* and when viewed in the totality of the circumstances would cause the subsequent identifications to be very reliable and the product of proper police work.

The key factor in this analysis under the totality of circumstances, we respectfully contend, would be the promptness with which the suspects were brought back to the bank for the showup. Even excepting the longest possible time which was set forth in the testimony—40 minutes from the time of the bank robbery—the Government would contend that this time span would certainly be one which would not be excessive. Indeed, the viewing of suspect within 40 minutes from the time of an attempted bank robbery could hardly be done at a time when the memory would be more fresh in the minds of the viewers.

The opportunity to view defendant Cole was certainly ample for all three witnesses who identified him. Sara Johnson stated that she observed Mr. Cole walk from the entrance of the bank directly across to her teller line (App. 52). He stood in front of her, behind the customer she was waiting on for some time period and then walked a few feet away to the express line in the bank (App. 52). She then observed him proceed to the teller immediately adjacent to her, Elizabeth Malary, who proceeded to wait on him. Mrs. Malary testified that she observed him walk across the bank and stand behind a customer she was waiting on, then at her direction, moved over to Sara Johnson's line to wait behind a customer she was waiting on, and then finally go to the head of the express line (App. 125, 126). He then approached her window, again at her direction, and proceeded to hand her the demand note for

the bank robbery (App. 127). Douglas Murdoch was a customer of the bank at the time and he testified that he became very suspicious of the individual in the bank and even though he had completed his transactions, he left the bank and waited across the street because he was afraid there was going to be a problem with the individual he had been suspicious of inside the bank. (App. 93). All three of the individuals had a very good opportunity to view Gary Cole in a well lit bank and Sara Johnson and Elizabeth Malary had direct face-to-face confrontations with him.

Further the degree of attention with which they would look at Gary Cole would have been heightened by the fact that Sara Johnson and Elizabeth Malary are bank tellers and as such might be commonly on the lookout for suspicious individuals in their bank. The fact that Cole crossed the bank, instead of waiting in the express line with the other customers, and immediately tried to go to a line further drew their attention. When he additionally did not go the end of the express line as directed by Mrs. Malary but proceeded to the front of the express line, would be something which would further draw their attention, and their suspicion.

Concerning the accuracy of the description which they gave, Sara Johnson testified that he was a young black male with a medium build and he had a "bush" haircut. He was wearing a grey felt hat and a black three-quarter length leather coat (App. 52).

Elizabeth Malary testified that he was a young black male who was wearing a leather coat and a hat (App. 126). Further, that the color of his eyes were brown, he did not have a beard and he was not wearing any glasses and also had some freckles on his face (App. 134). When asked how tall he was she said that he seemed taller than I am and indicated that her

height was 5'2" tall; "I have to stand on a platform and so my accuracy in determining height would not be good" (App. 134).

Douglas Murdoch stated that when he first observed the young individual in the bank he wore a dark coat and a light felt-type hat (App. 96).

Elizabeth Malary and Sara Johnson observed Cole among four suspects in a showup at the bank approximately 40 minutes after the attempted robbery. Both picked out Cole as the individual who had entered the bank with the demand note for the bank robbery. Both of these bank employees indicated that they were absolutely sure about their identification of Gary Cole (App. 52, 130).

Given the facts as set forth above, there certainly cannot be a "very substantial likelihood of irreparable misidentification" due to the showup conducted at the bank. *Simmons v. United States*, 390 U.S. at 384 (1968). The trial jury in this case can certainly consider all of the above facts in considering any trial identifications to be made of defendant Cole and weigh them accordingly. Defendant Cole does certainly have the benefit that one of the bank personnel were unable to identify him at the hearing which was held in front of Judge Elfvin, and these are matters which the jury can adequately weigh using their common sense and fair judgment.

Taking all the circumstances in this case concerning the reliability of the identifications at the showup, the Government would contend that there is not a substantial likelihood of irreparable misidentification.

Conclusion

It is respectfully submitted that for the foregoing reasons Judge Elfvin's denial of the suppression motions should be in all respects affirmed.

Respectfully submitted,

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RE: U.S.A.

vs

Gary Cole, et al

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1265

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Leslie R. Johnson

Sworn to before me this

1st day of October, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
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My Commission Expires March 30, 1979